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Nationality of natural persons in relation to the succession of States

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Note by the Secretariat

Summary

The present note contains the comments of 15 Governments regarding nationality of natural persons in relation to the succession of States, submitted pursuant to General Assembly resolution 59/34.

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I. Introduction

1. At its fifty-first session in 1999, the International Law Commission adopted draft articles on nationality of natural persons in relation to the succession of States, and recommended their adoption by the General Assembly in the form of a declaration.

2. In paragraph 3 of resolution 54/112, the Assembly invited Governments to submit comments and observations on the question of a convention on nationality of natural persons in relation to the succession of States, with a view to the Assembly considering the elaboration of such a convention at a future session. The Assembly reiterated the invitation in resolution 55/153, to which the text of the draft articles was annexed. Comments and observations received from Governments in response to that invitation are contained in documents A/59/180 and Add.1 and 2.

3. In paragraph 3 of resolution 59/34, the Assembly invited Governments to submit comments concerning the advisability of elaborating a legal instrument on the question of nationality of natural persons in relation to the succession of States, including the avoidance of statelessness as a result of a succession of States. In paragraph 4 of the same resolution, the Assembly decided to include in the provisional agenda of its sixty-third session the item entitled "Nationality of natural persons in relation to the succession of States".

4. As of 30 June 2008, replies to the invitation contained in resolution 59/34 had been received from the following States: Algeria (6 February 2008), Austria (7 December 2007), Belarus (3 March 2008), Brazil (20 June 2008), Canada (8 May 2008), Czech Republic (25 February 2008), Ecuador (25 March 2008), Kenya (3 March 2008), Luxembourg (4 October 2007), Mexico (14 March 2008), Philippines (9 January 2008), Portugal (28 February 2008), Republic of Korea (17 January 2008), Slovenia (30 May 2008) and Turkey (25 March 2008). These replies are reproduced in section II below, organized by topic. Any additional replies will be reproduced as addenda to the present note.

II. Comments received from Governments

A. General comments

Brazil

1. The issue of the succession of States usually entails a number of considerations in respect of the individual right to a nationality. When there is a unification of States, the solution tends to be relatively simple, as the successor State normally recognizes the nationality bond with regard to nationals from the predecessor States. The situation becomes more complex when there is the dissolution of a State or the separation of part or parts of its territory.

2. The right to a nationality is one of the fundamental human rights, in accordance with several instruments of international law. As is widely known, article 15 of the Universal Declaration of Human Rights of 10 December 1948 provides that "everyone has the right to a nationality" and "no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality". In conformity with article 24, paragraph 3, of the International Covenant on Civil

and Political Rights of 16 December 1966,[1] "every child has the right to acquire a nationality".

3. In the inter-American region context, for instance, article 20 ("right to nationality") of the American Convention on Human Rights of 22 November 1969[2] states that:

> "1. Every person has the right to a nationality.
>
> "2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality.
>
> "3. No one shall be arbitrarily deprived of his nationality or of the right to change it."

4. The draft articles elaborated by the International Law Commission duly emphasize (second preambular paragraph) that "nationality is essentially governed by internal law within the limits set by international law". This is in line with the Convention on Certain Questions relating to the Conflict of Nationality Laws of 12 April 1930,[3] as well as international practice and jurisprudence (notably the *Nottebohm* case).[4] Article 1 of the 1930 Convention establishes that:

> "It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality".

Mexico

[Original: Spanish]

1. In accordance with Mexico's statement to the General Assembly in October 2004, safeguarding the nationality of natural persons means that they have the legal status necessary to ensure the full exercise of their rights. For that reason, Mexico is in a position to support the proposed articles.

2. However, Mexico proposes the inclusion of an article or a preambular paragraph stipulating that every effort must be made to ensure and promote respect for basic human rights at all times, regardless of the nationality or the territorial or legal status of the individual.

Philippines

1. The Philippines interposes no objection to the provisions of the draft articles on nationality of natural persons in relation to the succession of States.

2. The draft articles do not cover persons who are in the territory of the predecessor or successor State but are stateless at the time of succession. The inclusion of these stateless persons in the purview of the draft articles may reinforce the right of everyone to a nationality as embodied in the Universal Declaration of Human Rights.

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[1] See United Nations, *Treaty Series*, vol. 999.

[2] Ibid., vol. 1144.

[3] See League of Nations, *Treaty Series*, vol. 179.

[4] See *Nottebohm case (Second phase), Judgment of 6 April 1955, I.C.J. Reports 1955.*

Portugal

1. Portugal commends the International Law Commission for its work in preparing a set of draft articles regulating such a complex subject matter. The Universal Declaration of Human Rights embodies the fundamental principle that everybody has the right to a nationality. Bearing this in mind, the draft articles pursue the important objective of avoiding statelessness in case of State succession.

2. Nowadays, there is a greater balance between the relevance of the interests of States and those of individuals. Consequently, the practical interests of States regarding the succession process have to be soundly balanced with the rights and expectations of individuals regarding their nationality.

3. It is widely acknowledged that the attribution of nationality belongs to the realm of sovereign prerogatives of States. However, such prerogative must be performed within the limits imposed by international law. Hence, without denying the primary competence of States to attribute nationality, it is important to identify those limits, especially in the complex situation of succession of States. Portugal is of the opinion that the draft articles do so in an adequate manner.

Republic of Korea

1. It seems that the draft articles on nationality of natural persons in relation to the succession of States provisionally adopted by the International Law Commission represent a timely contribution to the development of norms in this field of law.

2. We have a few preliminary observations on the draft articles.

3. First, we are pleased to note that some of the provisions in the draft articles draw on and codify existing customary rules, thus reflecting the practice of States and the general interpretation of doctrine and jurisprudence.

4. Second, we appreciate the Commission's efforts to strike a fair balance between the rights and interests of individuals and the sovereign competence of States in determining who their nationals shall be.

5. In principle, we have no particular objection to the way the International Law Commission has organized the draft articles, dividing them into part I, on general principles and norms concerning nationality in relation to the succession of States, and part II, on principles applicable in specific situations. However, it seems more advisable that the States concerned should be allowed to conclude agreements to regulate their particular cases of succession, which may differ from the draft articles, except for a few core principles thereof. It is suggested that the addition of such phrases as "unless otherwise agreed" could be considered.

Slovenia

1. In cases of succession, the citizenship of natural persons is an important issue, one which every successor State faces as soon as it declares independence, since it involves practical and legal issues relating to its population, which represents one of the four preconditions for the establishment of a State.

2. For this reason, a successor State cannot postpone resolving the issue of citizenship of natural persons in the case of succession; usually the State, already in the process of acquiring its international legal personality and recognition, lays

down in its national legislation the conditions under which persons with permanent residence in the territory of the State in the period prior to its acquiring international legal personality may obtain citizenship. Such persons must be guaranteed legal protection and should not be subject to expatriation during the period between the beginning of succession and the adoption of the new State's national legislation (e.g., in accordance with the European Convention on Nationality, signed on 6 November 1997[5]). The right to citizenship is one of the fundamental human rights (the first international instrument enshrining this right was the Universal Declaration of Human Rights, specifically article 15 thereof).

3. At the time when many countries, particularly East and Central European ones, were facing this issue, international standards had not yet been defined or put into practice.

4. Slovenia would like to underline that, in the case of the dissolution of the former Socialist Federal Republic of Yugoslavia, the successor States concluded no such treaty governing the issue of citizenship of natural persons. Even considerably later, in 2001, the concluded Agreement on Succession Issues had not settled this issue between the successor States of the former Socialist Federal Republic of Yugoslavia.

B. Comments on the preamble and on specific articles

1. Preamble

Brazil

The preambular paragraphs refer to some international treaties concerning nationality and State succession. As already suggested by other Member States, the draft articles should include a reference to other relevant instruments, such as the Declaration of the Rights of the Child, of 1959[6] (Principle 3: "The child shall be entitled from his birth to a name and a nationality"), the International Convention on the Elimination of All Forms of Racial Discrimination, of 7 March 1966[7] (article 5: "In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: ... (d) Other civil rights, in particular: ... (iii) The right to nationality"), the Convention on the Elimination of Discrimination against Women, of 18 December 1979[8] (article 9: "1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband. 2. States Parties shall grant women equal rights with men with respect to the nationality of their children."), and the Convention on the Nationality of Married

[5] Council of Europe Treaty Series No. 166.
[6] General Assembly resolution 1386 (XIV).
[7] See United Nations, *Treaty Series*, vol. 660.
[8] Ibid., vol. 1249.

Women, of 20 February 1957.[9] The International Covenant on Economic, Social, and Cultural Rights, of 16 December 1966[10] could also be mentioned, as it protects the rights of every person, regardless of nationality.

2. Article 2. Use of terms

Brazil

The draft articles should contain a clear definition of a number of expressions with legal implications referred to in the text, including "habitual residence", "appropriate legal connection", "appropriate connection" and "effective link". The term "family" could also be more clearly defined. Setting a precise delimitation of these expressions would avoid occasional divergent interpretations on the part of Member States and international courts.

Kenya

There is a need to define the term "statelessness" and we propose the said definition be "situation where a person is not considered as a national by any State under the operation of its internal/municipal law". There is also a need to define the term "habitual residence" and we propose factual residence for a period of not less than seven years, for example.

Philippines

Clarification of the term "habitual residence", which is repeatedly used in the draft articles, may be useful since there is no definition of this term, or any standard of reference that could be used to avoid ambiguity or misinterpretation.

3. Article 3. Cases of succession of States covered by the present articles

Turkey

Notwithstanding article 3, which stipulates that the articles on nationality of natural persons in relation to the succession of States apply only to the effects of a succession of States occurring in conformity with international law, the criteria to be used for the determination of conformity with international law of cases of separation of part or parts of the territory of a State are uncertain. The commentary on section 4, while referring to the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, annexed to General Assembly resolution 2625 (XXV), provides that the case of separation of part or parts of the territory of a State is different from the case of non-self-governing territories. This issue is related to the concept of self-determination, the content of which is evolving. Indeed, it seems difficult to reach a consensus concerning the content of this concept or who could exercise self-determination in conformity with international law.

[9] Ibid., vol. 309.
[10] Ibid., vol. 993.

4. **Article 6. Legislation on nationality and other connected issues**

Kenya

This article should have a proviso that its provisions should have no prejudice to those of internal/national laws which are already in force or may come into force, under which more favourable rights are or would be accorded to persons concerned on the avoidance of statelessness.

5. **Article 9. Renunciation of the nationality of another State as a condition for attribution of nationality**

Kenya

This article could render it impossible for natural persons to acquire dual nationality and can thus not derive the benefits of dual nationality.

6. **Article 11. Respect for the will of persons concerned**

Republic of Korea

... the meaning and scope of the phrases "appropriate legal connection" (articles 22, 24 and 25), "appropriate connection" (articles 11, 22, 24 and 25) and "effective link" (article 19) is not really clear. It would be advisable to harmonize them, if they are intended to have the same meaning.

7. **Article 13. Child born after the succession of States**

Brazil

If it is to guarantee that a child born after the succession of States does not run the risk of becoming stateless, this provision could be adapted in order to allow for the attribution of nationality from his or her parents (*jus sanguinis*), as an alternative to the nationality of the State where the child was born (*jus soli*).

8. **Article 15. Non-discrimination**

Kenya

This article should elaborate the grounds of discrimination like sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

9. **Article 17. Procedures relating to nationality issues**

Kenya

This article should provide that fees charged for applications should not present an obstacle to the applicant for reasons of being unreasonable. Further, the article should state within which jurisdiction the said administrative or judicial review would be carried out.

10. Article 18. Exchange of information, consultation and negotiation

Kenya

This article should provide for cooperation not only with the concerned States but also with other States and international organizations.

11. Article 19. Other States

Republic of Korea

See above, section B.6.

12. Article 20. Attribution of the nationality of the successor State and withdrawal of the nationality of the predecessor State

Brazil

[...] it is worth noting the provision contained in article 10, paragraphs (1) and (2), of the Convention on the Reduction of Statelessness, of 30 August 1961,[11] which determines that:

> 1. Every treaty between Contracting States providing for the transfer of territory shall include provisions designed to secure that no person shall become stateless as a result of the transfer. A Contracting State shall use its best endeavours to secure that any such treaty made by it with a State which is not a Party to this Convention includes such provisions.
>
> 2. In the absence of such provisions a Contracting State to which territory is transferred or which otherwise acquires territory shall confer its nationality on such persons as would otherwise become stateless as a result of the transfer or acquisition.

This provision should be taken into consideration during the discussions regarding draft article 20.

13. Article 22. Attribution of the nationality of the successor States

Republic of Korea

See above, section B.6.

14. Article 24. Attribution of the nationality of the successor State

Republic of Korea

See above, section B.6.

15. Article 25. Withdrawal of the nationality of the predecessor State

Kenya

1. Article 25 contradicts article 11 on the will of persons qualified to acquire the nationality of two or more States concerned.

[11] Ibid., vol. 989.

2. Article 25 could render it impossible for natural persons to acquire dual nationality and thus could not derive the benefits of dual nationality.

Republic of Korea

See above, section B.6.

C. Advisability of elaborating a legal instrument on the question of nationality of natural persons in relation to the succession of States, and the possible form of an instrument

Algeria

[Original: French]

1. Algeria is in favour of the adoption of the draft articles on nationality of natural persons in relation to the succession of States in the form of a declaration by the General Assembly, as recommended by the International Law Commission.

2. The choice of a declaration — which is a non-binding text — not only contributes to the progressive codification of relevant international law but also allows the State concerned to continue to exercise its sovereign right to determine the conditions for attributing its nationality, subject, evidently, to its international obligations, notably in the area of human rights.

3. The aforementioned draft articles would therefore provide States with a "useful guide for practice in dealing with this issue".[12]

4. The attribution of nationality, which represents the ultimate bond of allegiance with the State and confers a sense of belonging to and connection with the latter, is a profoundly political act which cannot easily be regulated by binding international norms, particularly in situations involving the succession of States, in which political concerns predominate. It is therefore important to retain, as far as possible, the discretion of the State concerned to attribute its nationality in the light of its own policies and priorities.

Austria

While Austria had previously expressed a tendency towards the adoption of the draft articles as a convention, it currently would — like in the case of all other codification projects of the International Law Commission — prefer to wait for a few more years and continue to monitor the developments of State practice before making a decision on the elaboration of a convention.

Belarus

1. Belarus strongly supports the idea of elaborating a legal instrument on the issue of nationality of natural persons in relation to the succession of States, including the avoidance of statelessness as a result of succession of States.

2. Such an international agreement will strengthen existing mechanisms for the protection of the right of every person to citizenship proclaimed in the Universal

[12] General Assembly resolution 55/153, fourth preambular paragraph.

Declaration of Human Rights. Taking into account the seriousness of the problem of statelessness, it would be advisable to choose the form of an international agreement as the legal form for such an instrument.

Brazil

1. The adoption of an international instrument that deals with the matter of nationality in case of State succession would constitute an outstanding development in international law, as it would contribute to the reduction in the number of cases of stateless persons. Brazil attaches great importance to the efforts towards the reduction of statelessness and, as a consequence, has ratified the two main treaties in that field which are in force: the Convention Relating to the Status of Stateless Persons, of 28 September 1954[13] and the Convention on the Reduction of Statelessness, of 30 August 1961.[14]

[...]

2. With regard to the final format of the instrument, in the light of the importance of the subject, Brazil is of the opinion that the draft articles should be the basis for the negotiation of an international convention.

Canada

Canada appreciates the efforts undertaken by the International Law Commission in its study of the question of nationality of natural persons in relation to the succession of States and the formulation of draft articles. As a State party to the Convention on the Reduction of Statelessness, of 30 August 1961,[14] Canada recognizes the importance of taking measures to avoid statelessness and acts accordingly through its national law. However, it is Canada's view that the negotiation of a new legal instrument on the question of nationality of natural persons in relation to the succession of States will not serve the needs of the international community at this time. In their current format, the draft articles provide useful guidance in the form of basic principles for the consideration of States. We are also aware of the efforts of the Council of Europe to develop a regional Convention on the Avoidance of Statelessness in relation to State Succession[15] and note that the convention has not yet attracted the required number of ratifications to bring it into force. It therefore appears premature to consider the elaboration of a new legal instrument on this question until such time as we can benefit from the knowledge gained from the Council of Europe's experience. We remain, however, appreciative of the helpful guidance that has been provided to States by the work of the International Law Commission.

Czech Republic

1. The Czech Republic has already stated its opinion on the form in which the articles on nationality of natural persons in relation to the succession of States should be adopted during the consideration of the draft articles by the Commission and during the subsequent consideration of this item by the Sixth Committee of the General Assembly. In the statement it made in 1998 (see A/CN.4/493 and Corr.1),

[13] Ibid., vol. 360.

[14] Ibid., vol. 989.

[15] Council of Europe Treaty Series, No. 200.

which preceded the final adoption of the draft articles by the Commission, the Czech Republic expressed its conviction that the purpose of the draft articles was to provide the States concerned with a set of legal principles in this field, as well as with some recommendations to be followed by States when drafting their domestic laws on nationality. The Czech Republic expressed the view that for this purpose, the appropriate form of the draft articles would be a declaration adopted by the General Assembly, i.e., the form originally proposed by the Commission's Special Rapporteur on this topic and subsequently recommended by the Commission upon the adoption of the final text of the draft articles in 1999. The Czech Republic stated that the form of a declaration might not only be sufficient to achieve this purpose, but may even have certain advantages compared with the rather rigid form of an international convention. According to the Czech Republic's statement, such a declaration would allow a broader spectrum of problems to be addressed than a convention containing only international obligations; a declaration would also make irrelevant the discussion about whether its provisions may or may not be invoked vis-à-vis a new State that did not participate in its adoption. The Czech Republic also expressed the view that such a declaration might even enjoy a higher authority and have a greater impact on the practice of States than an international convention ratified by only a small number of States.

2. After the General Assembly in its resolution 55/153 took note of the articles on nationality of natural persons in relation to the succession of States, annexed to the resolution, the Czech Republic, during the consideration of this item by the Sixth Committee, expressed the opinion (see A/C.6/59/SR.15) that in the case of the articles in question, the form of a legally binding instrument (international treaty) would not be appropriate or practical. The Czech Republic felt that the main purpose of the articles, which was to provide States with a set of legal principles and recommendations to be followed when drafting their domestic legislation in this field, had already been achieved by adopting resolution 55/153.

3. In response to the Secretary-General's current request for comments on the advisability of elaborating a legal instrument on the question of nationality of natural persons in relation to the succession of States, the Czech Republic refers to its above-mentioned previous statements on this issue and the supporting arguments. The Czech Republic is thus of the opinion that a non-binding form of the articles on nationality of natural persons in relation to the succession of States is appropriate and sufficient.

Ecuador

[Original: Spanish]

1. Bearing in mind that the question of nationality of natural persons in relation to the succession of States is consistent with the general legal guidelines for the defence and protection of human rights, Ecuador considers it advisable to proceed with the drafting of a convention on the basis of the draft articles adopted by the International Law Commission.

2. Furthermore, Ecuador believes that the drafting of such an instrument considerably contributes to legislative development and to the advancement of international law.

Luxembourg

[Original: French]

Luxembourg is not, in principle, opposed to the drafting by United Nations entities of a legal instrument on the question of the nationality of natural persons in relation to the succession of States, in particular on the prevention of statelessness following the succession of States.

Mexico

[Original: Spanish]

The draft under discussion is acceptable, provided that, while ensuring respect for the right of persons to a nationality, effective protection is provided for those individuals whose cases may create legal uncertainty because they do not belong to any particular State. Accordingly, Mexico has no difficulty supporting the planned development of a legal instrument on this issue.

Portugal

1. The question of ensuring compliance with those limits [limits imposed by international law with respect to the attribution of nationality] also relates to the final form and the legal strength to be assumed by the draft articles. There appear to be three options: to leave the draft articles as an annex to General Assembly resolution 55/153; to adopt the draft articles as a declaration of the General Assembly, as recommended by the International Law Commission; and to draft an international convention on the basis of the draft articles.

2. Portugal believes that, for the moment, the adoption of the draft articles as a declaration would be the most reasonable option, allowing the immediate and authoritative stabilization of a diffuse set of norms and practices, combining codification with progressive development of international law. However, the adoption of the draft articles as a declaration should occur only when broad support by States can be expected.

Republic of Korea

While we have no particular objection to the General Assembly embarking in the foreseeable future on the drafting of a convention on the nationality of natural persons in relation to the succession of States, it is suggested that the draft articles should take the form of a declaration rather than of a convention on this matter.

Slovenia

1. Neither the Vienna Convention on Succession of States in respect of Treaties, of 23 August 1978,[16] nor the Vienna Convention on Succession of States in respect of State Property, Archives and Debts, of 8 April 1983, regulate the issue of citizenship of natural persons. In this respect, it is worth noting that it took 16 years for the 1978 Convention to enter into force, and that the other Convention has as yet not entered into force. If a legally binding international instrument existed, it would apply only to cases of successor States established after it had entered into force;

[16] See United Nations, *Treaty Series*, vol. 1946.

there is, furthermore, the question of the binding nature of such a convention on a new State under international law, which would, most probably, not succeed to it and/or sign and ratify it immediately.

2. Rules on citizenship, in the form of a non-binding document, should reflect the modern practice of States in this area, which requires further detailed examination and analysis, as well as guidelines in accordance with international standards in this field. Considering that the issue of regulating the citizenship of natural persons in the case of succession presents one of the most difficult succession issues, Slovenia advocates a progressive approach towards settling this issue that might also result in a legally binding document. It furthermore believes that it is important, at present, to formulate a soft law document, containing clear and authoritative guidelines as a useful guide for dealing with this issue in practice.